SUPREME COURT

OF THE

91

UNITED STATES:

DECEMBER TERM, A. D. 1861.

No. 139.

Frederick B. Leonard and Chauncey P. Ives,

vs.

Chauncey Davis, Alfred E. Loomis, John C. Dore and Theodore Newell.

ERROR TO THE U. S. CIRCUIT COURT FOR MICHIGAN.

BRIEF FOR DEFENDANTS IN ERROR.

CHICAGO:
JAMESON & MORSE, PRINTERS.
1862.

THE SUPREME COURT OF THE UNITED STATES.

FREDERICK B. LEONARD AND CHAUNCEY P. IVES

vs.

CHAUNCEY DAVIS, ALFRED LOOMIS, JOHN C. DORE AND THEODORE NEWEL.

This is an action of assumpsit commenced in the Circuit Court for the District of Michigan, to recover the price of a quantity of pine saw logs alleged to have been sold by the plaintiffs to the defendants by a written contract of sale, of which the following is a copy:

C. Davis & Co., of Muskegon, Michigan, bought of Leonard & Ives, of Lansingburgh, per J. C. Shaw, agent, a quantity of pine saw logs, got out last winter by A. B. Furnam, supposed to be about fourteen hundred and forty-four (1444 M. ft.) thousand feet, in board measure, at the rate of four dollars and fifty cents per thousand feet for those afloat in the booms and bayous near the head of Muskegon lake, and four dollars and twenty-five cents per M. feet for those on the bank and in marsh near said lake and booms, all to be counted, measured and scaled by the boom-master, or such other person as parties may agree on, as they are rafted.

Said Davis & Co. are to raft up and secure all they can this fall, and all they can next spring before the new drive comes down, and those not rafted up at that time are to be scaled as far as to be found on bank, in booms and bayous, as aforesaid.

Payments to be made as follows: All rafted up this fall to be paid for on the fifteenth December next; Those rafted in the spring to be paid for at the end of each month's rafting, and the balance to be settled for as soon as the scale of those not rafted shall be completed, as aforesaid.

And we, said Davis & Co., agree to take all the merchantable logs at the rates and on the conditions herein named.

In consideration of the foregoing contract and sale, we acknowledge the receipt of one hundred dollars.

Muskegon, Mich., November 6, 1856.

(Signed,) J. C. SHAW, AGENT,
For LEONARD & IVES.
C. DAVIS & CO.

Some explanation of the situation of the logs at the date of this contract, and of the course of the business of rafting up and *scaling* logs seems to be necessary to enable the Court to understand some of the provisions of the contract.

The logs had been driven down the Muskegon river the previous spring, or early part of the summer, from the upper waters of said river, in the pine forest near the banks of which they had been cut. They had come down in the general annual drive of logs, consisting of from forty to sixty million feet, belonging to the various manufacturers, distinguishable from each other only by the proprietors' mark stamped upon each log; and at the date of the sale the logs in question were afloat in a large boom of the Lumberman's Association, mixed with so many as remained of the logs composing said *drive*.

The boom in which said logs were, is located at the head of Muskegon Lake, a body of water formed by the widening of the river of the same name near its mouth, and is about six miles in length with a breadth of from ½ a mile to 2½ miles, and connected at its lower or westerly end with Lake Michigan by a narrow outlet about ½ a mile in length. The boom consists of about two hundred acres of the upper end of said lake, enclosed by squared logs lying upon the surface of the water, fastened together at the ends by chains or pins, and kept in place by poles or posts driven into

the bottom of the lake. It is of sufficient capacity and designed to receive and contain all the logs coming down said stream.

This boom is the property of an association of the lumber manufacturers at Muskegon, incorporated under a general law of the State for the purpose of rafting and booming logs and lumber on said river and lake.

Besides this association boom intended as the common receptacle of all the logs coming down the river, each of the mills on said lake is supplied with its private boom called a mill boom, intended to receive the logs of the owner of such mill, when delivered from the association boom.

The course and custom of the business of *rafting up and scaling* logs in said association boom, was, (as described by the testimony contained in this record,) as follows: Each owner of logs in said boom sent to the boom a number of raftsmen equal to his proportion of the logs. These raftsmen, thus employed by all the owners of logs, after being divided and organized into convenient gangs or companies, proceeded to raft up the logs of all the owners, taking them in order as they came to them, and rafting up all as far and as fast as they went. The manner of rafting is simply to take and separate the logs from the mass of logs in the boom, and placing them side by side, fasten them together with a chain supplied with iron pins called dogs, driven into each log. The logs of each owner are thus formed into separate rafts; after the logs have been thus rafted up, and before they are removed from the association boom, they are generally measured by the boom-master and his assistants for the purpose of determining the amount of fees due the association for driving, booming, etc. This measurement is termed scaling. The rafts are then towed by steam tugs to the mill booms of the owners.

A certain number of the logs driven down the river every year are cast, by the action of the winds and currents, upon the marshes adjacent to the boom, and some are driven far up small creeks or bayous, while others escape from the boom either when it is opened to let out rafts, or by breaking, or by being carried over the boom by the waves. Many of those thus escaping are carried by the winds and currents upon the shores, and the raftsmen of the differ-

ent proprietors gather up all such logs annually from the shores and marshes, and separate and form them into rafts, as above described, and send them to the owner whose mark they bear.

This process of rafting usually occupies the entire season of navigation, and the association boom is then seldom cleared.

By the above explanation, (taken substantially from the evidence contained in this record) it is manifest that the logs of each proprietor are rafted in the order in which they happen to be reached in the regular progress of the business of rafting the whole quantity in the boom, and that any owner of logs who should desire and attempt to raft up his own logs faster or quicker than they are reached by the raftsmen in the regular progress of the business, would be compelled to select them out of the whole mass of logs, taking his own and leaving the rest, and this, according to the testimony in this record, would not only cost very much more than the logs are worth, but would be impracticable.

The course and custom of rafting above described is not only the usual and only one pursued in the boom in question, but is, according to the evidence in this record, the only practicable mode of rafting up so large a quantity of logs, and must be considered as the course of business contemplated by the parties to said contract; and hence the uncertainty whether the whole of said logs could be rafted up during the then current fall, and during the following spring, before the next drive came down. It would manifestly and necessarily depend upon the progress made by all the raftsmen engaged in rafting the whole mass of logs, as well as upon the efforts of the defendants.

The declaration in this case contains two special counts upon the above contract, besides the common counts in assumpsit.

The first count alleges that the plaintiffs were the owners of about 1444 M. feet of pine saw logs situated in and about Muskegon lake and river, and that on the 6th of November, 1856, the plaintiffs and defendants entered into an agreement, in writing, by which it was agreed between the parties that the said defendants bought of the plaintiffs and the plaintiffs sold to the defendants all the merchantable logs in said quantity of pine saw logs, supposed to be about 1440 M. feet, at $4.50 per M. feet for such as were

afloat, and $4.25 for such as were on the banks and marshes, all to to be counted, measured and scaled by the boom-master of the said Lumberman's Association, or such other person as the parties should agree upon, and that said defendants were to raft up all they could of said logs the (then) current fall, and all they could the (then) next spring before the drive of logs came down; and that all those logs not then rafted up should be scaled as far as found where they lay, in the boom, etc., and that payment should be made for said logs, as follows: for all rafted up the then current fall, on 15th December of that year; for those rafted the next spring, at the end of each month's rafting; and for those not rafted, as soon as the scale should be completed.

Plaintiffs also alleged, that at the time of such contract, all the said logs were merchantable.

That the whole quantity, 1444 M. feet, were delivered to defendants during said current fall.

That said logs were all afloat, and consequently defendants were liable to pay $4.50 per M. feet for the whole quantity.

That defendants could have rafted them all up the (then) current fall and the next spring before the drive came down.

That after said drive came down, there remained a large quantity of said logs not rafted up which defendants might have scaled.

That defendants neglected to raft up said logs at the several times when they were bound by his contract to raft them.

That they neglected to cause them to be scaled by the boom-master, and caused such as were rafted up to be scaled by their own servants, etc.

Neglected to pay for the logs.

The second count is the same as the first, except that it is therein alleged that plaintiffs *agreed to sell and the defendants agreed to purchase* all the marketable logs in said quantity of pine saw logs.

To this declaration defendant plead the general issue, and gave notice of set-off and that but a part of the logs ever came to the defendant's possession, and of this part but few were merchantable, and the balance of them were of inferior quality and worthless,

and that defendants would seek to recover for damages which they had suffered from inferior quality of the logs.

Upon the trial there was a verdict of no cause of action, followed by a judgment for the defendant for costs of suit.

The errors alleged arise upon the bill of exceptions, and as each of the rulings and decisions to which exceptions were taken is alleged to have been erroneous, it becomes necessary to examine all of the exceptions.

The bill of exceptions does not purport to contain all of the evidence in the case, and in fact is so meagre in its detail of the facts and evidence as to furnish no correct impression of the merits thereof, or the real grounds upon which the case was decided.

The proof in the case actually showed that defendants had sawed some of the said logs into lumber, and also that a large sum of money had been paid by the defendants on said contract, but as none of the evidence on either of these points is contained in the bill of exceptions, it is impossible for the Court to determine whether the sums so paid by defendant were sufficient to pay the plaintiffs for such portions of the lumber as had been actually received by defendants.

The plaintiffs in error were bound at their peril to insert in the bill of exceptions so much of the evidence as was necessary to show affirmatively the errors of which they complain, and if they have failed to do so the deficiency cannot be now supplied by assumptions of the court or statements of counsel.

The plaintiff in error must prove the alleged errors by the record alone.

The errors alleged must not only be affirmative, but fully proven, manifest error. Probable errors are not sufficient to reverse the judgment.

Westcott vs. Eauzenboker, 1 *Holct.* 132.
Lander vs. Reynolds, 3 *Litt.* 14.

The exceptions alleged by the plaintiff in error to the judgments and proceedings in the Court below, are stated and set forth in the bill of exceptions, as follows:

First Exception.

The plaintiff having proved and read in evidence the contract upon which the suit was brought, and given evidence tending to show that one of the defendants had admitted that he had neglected to scale the logs; at this stage of the case plaintiff offered in evidence a written document, described in said bill of exceptions as follows: "A written paper signed by C. Davis, Treasurer of the "Lumbermen's Association, so called, and purporting to be a re-"ceipted draft drawn by said Davis, as such Treasurer, on the "plaintiffs, for $525, being the price of driving down into the boom "of said Association 1444 M. feet of logs belonging to plaintiffs.

"To this evidence defendants objected, and the objection being ~~overruled~~, plaintiffs excepted."

It is stated in the bill of exceptions that this draft of one of defendants on plaintiffs was offered with a view to prove the knowledge by defendants of the quantity and situation of the logs before and at the time of purchase.

Defendants' objection to the admissibility of this draft is two fold:

1. It is not competent evidence of the knowledge of defendants of the situation and quantity of the logs before and at the time of contract of purchase.

2. Such knowledge of defendant of the amount and situation of the logs, is itself wholly immaterial to the issue, and it is not error to reject legal evidence of an immaterial fact.

Turner vs. Tendell, 1 *C.* 116.

The draft being made by Davis officially, as Secretary, is, in law, the act of the Association, and such draft, and its acceptance and payment, constitute a transaction between said Association and plaintiffs. As to defendants, it is *res inter alios*, and can, in law, have no effect to estop, conclude or bind defendants, ~~as it is reasonable to presume that all drafts for services rendered by said Company are drawn by its Secretary.~~

But can it be presumed that the Secretary makes such drafts upon his personal knowledge of the facts upon which they are drawn? A man may be chargeable, individually, with knowledge acquired in an official capacity, but an official act can only be re-

ceived as evidence of personal knowledge when that act either necessarily implies such personal knowledge, or is shown to have been based upon such knowledge.

Now, as it is reasonable, from the name of the office of said Davis, and the duties which usually attach to that office, to suppose that all drafts for fees earned by the Association were drawn by him as Secretary, as well when the facts were known to him by report and hearsay, as personally, the fact of making such draft has no tendency to prove personal knowledge of the facts upon which it was drawn, and which are stated in it; unless, indeed, this Court will infer and presume that the Secretary of such an Association must be personally acquainted with all the business and transactions of said Association, which, considering the character of the ordinary duties of a Secretary, and the remoteness of the business of rafting and driving logs from those duties, would be a very violent presumption.

But the draft, as stated in the bill of exceptions, is without date, and no evidence was offered in connection with it to supply this defect, and consequently there was nothing, either on the face of the draft or in the offer made, to connect it with the logs in question.

For the above reasons, the draft offered had no tendency to show that defendants had knowledge of the amount and situation of the logs before the date of the contract of purchase.

But the fact that defendants knew the amount of logs of plaintiffs in the same boom, before and at the date of the contract, and their situation, is itself wholly irrelevant and immaterial to the issue.

The contract binds the defendants to receive and pay for only such of said logs as are merchantable, and even those according to a measurement thereafter to be made.

How can any knowledge of the quantity and locality of the whole mass of logs mentioned in this contract affect either the right of recovery in this suit, or the amount recovered?

It was claimed on the trial in the Court below, that defendants, by violating certain executory provisions of the contract, had rendered themselves liable for the whole amount of logs of plaintiffs in the boom, of whatever quality, and whether they had been scaled

or not. But even upon such a hypothesis, the material point would be, how many logs there were of plaintiffs in said boom; for the liability of defendants would be governed by the actual quantity, and would not be affected by their knowledge or ignorance of the quantity or locality of the logs.

How would it affect the plaintiffs' rights in this case, under this contract, if it should be shown or admitted that they actually knew the exact situation and number of the lot of saw-logs of plaintiffs so contracted for by them before the date of contract?

The defendants have agreed to take and pay for so many of them only as are merchantable, at a measurement provided for in the contract. Could their knowledge or ignorance of said logs diminish or extend the liability thus assumed? It is certainly difficult to see upon what principle the knowledge or ignorance of defendants could produce such effect.

But suppose defendants, by some neglect or violation of duty under the contract, have rendered themselves liable at the contract price for the whole quantity of such logs. Would their knowledge or ignorance of the quantity and situation (location) of the logs in any way affect their liability? The defendants would be liable in that case for whatever quantity the plaintiffs could prove were in the boom at the date of the contract, and not for such quantity as defendants knew were in the boom.

This evidence, it must not be forgotten, was offered, not to show how many or what quantity of logs were in the boom, belonging to plaintiffs, before and at the time of sale, but expressly and merely to show the *knowledge of defendants* of such quantity, &c.

To this object the plaintiff is confined here.

In conclusion of their argument upon this exception, the defendants insist:

That the draft offered in evidence with the sole and avowed object of showing the knowledge of defendants of the amount and situation of the logs in question, signed officially by one of the defendants, was a transaction between the Lumbermen's Association and plaintiffs, and cannot estop, conclude or bind the defendant Davis, individually.

That from the character of the duties implied by his name of office, he would be bound to draw all drafts of the Company, whether for transactions within his knowledge or not, and therefore the making of such draft does not imply *personal knowledge.*

That the ordinary character of the employment and duties of a Secretary are confined to making and keeping books of account, records and documents, and do not extend to the actual business of of driving or rafting logs, and therefore no personal knowledge of such business can be inferred.

That the draft is without date, and no evidence was offered to supply this deficiency, and therefore the evidence did not affirmatively appear to be relevant to the case.

That the object sought to be accomplished by such evidence is wholly immaterial.

The knowledge of defendants of the amount and locality of the logs could not affect the case in any way.

But the knowledge of the defendants of the amount and locality of these logs is fully admitted in the contract itself, and is much better proved by such admission than by such draft, and therefore the evidence so offered by plaintiffs was entirely unnecessary, and if admitted could not have effected the result.

The second exception stated in the bill of exceptions is as follows:

The plaintiffs having given evidence as above stated, then, by Joseph Hackly, gave evidence tending to show that there was in 1856, and ever since, a corporation at Muskegon called The Lumberman's Association; that they maintained a very large boom at the bend of Muskegon Lake, covering 200 acres, which was designed to receive all the logs which came down Muskegon river; that witness was boom master in 1857 and 1858, but that he personally scaled none of plaintiffs' logs. On his cross-examination, witness gave evidence tending to prove that he had deputies; that Barney L. Hatch was his deputy in 1857, and was employed to do scaling of logs.

Defendants then proposed to witness the following question: "Was there any other person who performed any of the duties of boom master and was called boom master?" To which question

plaintiffs objected, and the objection being overruled, excepted.

A question which may be deemed of some importance in this case, is, whether the duty of scaling the logs described in the said contract was analogous to those of an arbitrator, and therefore strictly personal to the boom master, or whether they could be delegated and performed by assistants.

It was probably with a view to raise this question that this exception was taken. No such question is, however, raised by the exception.

The question objected to is, whether Hackey, the boom master, had an assistant who performed any of the duties of boom master and was called boom master?

This witness called by plaintiffs had testified in chief that he, witness, was boom master, and that he had not personally scaled the logs in question.

On his cross-examination, he had, without objection, testified that he had an assistant, one Barney L. Hatch, who was employed in scaling logs. Defendants' counsel then proposed the cross-interrogatory objected to, which, without regarding the leading form in which it is expressed, requires the witness to state whether there was any person who performed the duties of boom master, and was also called by the name of that office, because if the witness, although hired as a boom master, had ceased to perform the particular function of that office required in this contract, and another person had assumed that function, with the title mentioned in the contract, it might be a fair question which was to be considered the boom master. Suppose the facts to be as testified by this witness, that there were two persons who were called boom master, one of whom took care of the boom and kept it in repair, while the other superintended the business of scaling logs, to which of them does the duty of scaling the logs under this contract appertain?

But the exception here taken is to the question whether there is such a person who performed the duty of boom master and received that title?

The witness had testified that, although he was boom master, he did not scale logs, but was employed in another business—keeping the boom itself in repair. Now, upon cross-examination for

the purpose of determining who the proper person to scale said logs might be, was it not competent to prove that there were two persons with that title, one of whom was engaged in scaling logs?

Suppose it were determined, or should be admitted, that the duty of scaling the logs under said contract is strictly a personal duty, and could be performed only by such boom master in person, still it is necessary to determine who the boom master is. Certainly, on cross-examination of a witness who testifies in chief that he is the man, it is within the limits of on ordinary cross-examination to inquire whether there are more than one who enjoy the title and perform the duties of the office, and this is all that has been done.

But even if erroneous, the decision here excepted to cannot injure the plaintiffs. The fact that there were two persons bearing the title of boom master, one of whom performs the duty of scaling logs, while the other repairs the boom, is admitted; but the question who was authorized to scale the logs in question is undecided; the latter is the only question in which plaintiffs are concerned, and if this question is correctly determined, the fact that there were other boom masters or assistants, would be entirely immaterial.

The admission of evidence which is wholly irrelevant and immaterial is not an error to the prejudice of the plaintiffs, and therefore not available in error.

The third exception noticed in the bill of exceptions is as follows:

The plaintiffs then, for the purpose of proving the quantity of logs for which the defendants were liable in this action, offered to read in evidence the depositions of A. C. Shaw, Ezekiel I. Leathers and Hiram I. Walker, tending to show the quantity of a lot of logs scaled by them for A. B. Firman, in the woods where they were cut, in the winter of 1855 and 1856, near the banks of the Muskegon river, about 40 miles above the boom; also to prove by A. B. Firman that said lot of logs was the same which he sold to plaintiffs, and which were intended in the contract made between plaintiffs and defendants; and by B. Watson and A. J. McHenry, that they had contracts for the spring drive of logs in Muskegon river in the spring of 1856, and followed those logs with the spring drive down into the big boom.

To this evidence defendants objected, and the Court sustained the objection, to which ruling plaintiffs excepted.

The testimony here offered, and rejected by the Court, tended in effect to show the amount or quantity of logs which plaintiffs had in the Lumberman's Association boom prior to the contract of purchase, to wit: the quantity of logs they had bought in the winter of 1855 and 1856, and caused to be driven down into the said boom, and the object of the evidence, as stated in the record, was to show the quantity of logs for which defendants were liable in this suit.

Upon what ground can it be contended that this evidence is admissible? Certainly, under the contract of purchase, such evidence could have no effect or influence either upon the right of recovery or the amount of such recovery, because, as will appear by inspection of said contract, defendants expressly limit their liability to the merchantable logs in said boom; and even these they agree to receive and pay for, not according to any previous measurement, but according to a subsequent measurement provided for in said contract. The mode of determining the quantity of logs here provided by the parties themselves is as clearly exclusive and prohibitory of all other modes, as though the parties had by express provision excluded and forbidden all other modes.

But the plaintiffs contended in the Court below that defendants had, by certain alleged violations of the contract, become liable in this suit for all the logs of plaintiffs in said boom at the date of said contract, and it is upon the hypothesis of such liability alone that that the evidence here offered and rejected can be claimed to be admissible.

It requires no argument to prove that until the plaintiffs had offered evidence tending to establish such liability, they were not entitled to introduce the testimony under consideration, for there is no error in excluding evidence which at the time it is tendered does not appear to be admissible; and until the plaintiffs had offered evidence extending the liability of the defendants beyond that assumed in the contract, to wit: to take and pay for the *merchantable logs only, according to a measurement thereafter to be made*, no evidence of any previous measurement would be admissible.

To render the exclusion of this evidence erroneous, therefore, it must appear to the Court from the record that the plaintiffs had, previously to tendering such evidence, given to the jury evidence tending to extend the liability of the defendants beyond that which is created by the contract, and, indeed, charging or tending to charge them with the price of all the logs of plaintiffs in said boom at the date of the contract.

To determine whether such evidence had in fact been given, it becomes necessary to examine the record and the evidence seated in it.

The testimony offered by the plaintiffs previously to the tender of the evidence under consideration, was as follows:

First. The contract of sale "of all the merchantable logs in "said quantity of pine saw-logs, to be thereafter counted, measured "and scaled by the boom master, or such other person as parties "should agree on."

Second. Evidence tending to show that C. Davis, one of defendants, had (at some time and under circumstances not stated) admitted that he had neglected to scale the logs.

Third. That there was at Muskegon, in 1856, and had ever since been, an association called The Lumberman's Association, and that they had and maintained a boom covering 200 acres.

Fourth. That Joseph Hackly was boom master of said Association in 1857, and Barney L. Hatch was his assistant, and was also called boom master, and was engaged to do the scaling in said boom, while Hackly kept the boom in repair.

Fifth. In the same year, (1857,) A. J. McHenry was employed by defendants to raft up their logs in said boom by the job, and was also the same season employed by the said Lumberman's Association assistant to said Barney L. Hatch, one of the boom masters, to aid him in the business of scaling logs in said boom.

Sixth. That during the time O'Harrow & Lange were in the employ of defendants. That they, O'Harrow & Lange, at the request of McHenry, the assistant boom master, scaled some of the logs mentioned in said contract. That the logs which said O'Harrow and Lange scaled were some that had escaped from the boom of the Lumberman's Association and been cast on the shores of

the lake, whence they had been collected by the raftmen and taken to defendants' mill boom.

Seventh. Plaintiffs proved by the books of the Lumberman's Association that defendants had *rafted up and secured*, of the logs mentioned in the contract, logs which by the scaling measured 760,719 feet.

The above is all of the evidence offered by plaintiffs prior to the tender of the evidence under consideration; and it is upon the assumption that this evidence is sufficient to extend the liability of defendants beyond that assumed in the contract, and charge them with the price of all the logs of every kind which plaintiffs put into said boom before the sale, that the evidence under consideration was offered, and is now claimed to have been admissible, and erroneously excluded. Because, unless the liability of the defendants extends to all the logs purchased by the plaintiffs the previous winter, and put into the boom, there is no ground upon which the measurement of such logs by the agent of plaintiffs, eight or nine months before the date of contract of sale, can be held to be admissible.

The theory of the plaintiffs, upon which they claim to hold defendants liable beyond the logs which they had agreed to receive and pay for, and compel them to receive said logs according to a different measurement from that provided for in the said contract, is stated in the declaration in this case.

The declaration alleges that defendants agreed to receive and pay for all the merchantable logs of plaintiffs in said boom, according to a measurement to be thereafter made by the boom master, or such other person as parties should agree on, and that defendants agreed to raft up and secure all they could of said logs the then current fall; all they could the next spring before the drive of logs came down; and that it was agreed between the parties that all of said logs so rafted up should be scaled by the boom master, &c., as they were rafted, and that all logs not rafted up by defendants before the drive of logs came down should be scaled where they lay.

Said declaration further alleges that all of the said logs were merchantable, that defendants might have rafted up all of said logs before the said drive of logs came down, but neglected to do so.

That defendant might have caused all of said logs rafted up, and all that remained not rafted up, to be scaled by the boom master, but neglected to do so, and caused all the logs that were rafted up to be scaled by their own servants and agents, and by such violations of the contract it is now claimed that defendants became liable to pay at the contract price for all the logs of plaintiffs which they can prove were in the boom at the date of the contract.

The plaintiffs seek to charge the defendants for the price of all the logs in said boom according to a previous measurement, instead of the merchantable logs, to be received and paid for according to a measurement made under the contract, upon the ground (in substance) that it was the duty of defendants under the contract to have the logs rafted up and scaled, and that they neglected to do so, and therefore having neglected to adopt the method prescribed in the contract for ascertaining the quantity of said logs, plaintiffs are at liberty to resort to the best evidence attainable.

Without at present inquiring whether the defendants, by neglecting to raft up the logs and have them scaled according to contract, would have rendered themselves liable to pay for all the logs plaintiffs could prove to have been in the boom belonging to them at the date of the contract, let us inquire whether the evidence, above recited, shows or tends to show any such neglect of duty by defendants.

It will be observed that the contract requires the defendants to raft up and secure as many of said logs as they can the then current fall (1856), and as many as they can the next spring (1857). This was all the duty required of them in respect to rafting and securing the logs. They were not bound to raft up all of said logs at any time; nor to raft any after the drive came down in the spring of 1857. All that then remained not rafted up were to be scaled where they lay.

To prove a violation of the above provisions, "requiring de-"fendants to raft as many as they could," of said logs within the period mentioned, the plaintiff must show by competent evidence how many logs defendants could have rafted up within that time, and that they in fact rafted less than such quantity. There is not the slightest evidence in the record upon that subject.

The plaintiffs proved, indeed, that defendents had rafted up and secured over 700,000 feet, but whether they could have rafted more or not we have no means of knowing, nor indeed is there the slightest evidence to show that there were any more logs remaining to be rafted, for although in the contract the whole quantity of logs therein mentioned is estimated at about 1440 M. feet, it appears by the record that upon the arrival of said logs at the head of Muskegon Lake, the boom had been removed and a portion of them escaped into Lake Michigan and were lost. This was before the sale to defendants, and how many were thus lost there is not the least means of forming even a conjecture.

The estimate in the contract furnishes, therefore, no means of determining the quantity of the logs, nor would the evidence proposed furnish a more reliable criterion, for without knowing how many were so carried out into the lake and lost, the number originally put in would furnish little assistance in ascertaining the quantity that remained.

But if it were admitted that the whole amount mentioned in the contract was in fact in the boom at its date, still the record contains not the slightest evidence of neglect on the part of defendants to raft up all they could before the drive of 1857 came down, which was the extent of their duty.

From the description of the process of rafting up hereinbefore given from the testimony contained in this record, it is manifest that the quantity of said logs which the defendants could raft up within a given time, would depend entirely on the progress of the general business of rafting in the boom, and that defendants could make no more rapid progress than was made by the other proprietors of logs in said boom, from which it follows that the progress of the business was governed by causes beyond defendants' control.

But it is needless to argue the question of the ability of defendants to raft up a larger quantity of said logs than they did.

The onus of establishing this fact was upon the plaintiffs and the record contains no evidence upon the subject.

The next breach of the contract alleged by plaintiffs as a ground upon which to charge them with all of the logs in the boom, is their alleged neglect in reference to the scaling of said logs.

Before attempting to determine whether the defendants have neglected their duty in this respect, it is material to determine what that duty was.

The parties, in their contract, agree that the scaling "shall be "done by the boom master, or such other person as they may agree on." Such person must be regarded as equally the agent and servant of both parties, and if guilty of neglect, such neglect is no more attributable to one party than the other.

It was the duty of defendants to raft up the logs as fast as they could, and it then became the duty of the party selected and appointed for that purpose to scale them, and in case he should refuse or neglect to perform this service, it was competent for both parties to select another person.

The plaintiffs are described as residents of the State of New York, but they had an agent on the spot who made the contract, and it devolved upon them no less than upon defendants to procure the logs to be scaled.

It appears, by the evidence, that all of the logs rafted up by defendants in the association booms, were scaled by Barney L. Hatch, aided by A. J. McHenry.

One Hackly testifies that he was the boom master the year when these logs were scaled (1857), and that said Hatch was also called boom master, and had the charge of the business of scaling logs for said association, and that McHenry was employed by said association to assist said Hatch in scaling.

That he, Hackly, was engaged in keeping the boom in repair, while Hatch and McHenry did the scaling, and by them the logs in question were scaled, except such logs as had escaped from said boom, and had lodged on the shores of the lake from whence the raftmen had collected them and brought them to the mill boom of defendants.

The logs last mentioned were scaled by a Mr. O'Harrow and a Mr. Lange, at the request of said Hatch, (the assistant boom master.)

This is all the evidence in this record relative to the scaling of said logs.

All of the logs, except a few which had escaped from the boom and got scattered on the shore and been collected by the raftmen, were scaled by one of the boom masters of the Lumberman's Association, with the aid of an assistant, in the same manner as the other logs scaled by said said association, and the few scattered logs which had so escaped from the boom were scaled by two other persons who were requested to do so by the assistant boom master.

There is not the slightest evidence in the case that defendants interfered in any way with such scaling, or that they directed or requested the said persons or any of them to do such scaling. Whether the said boom master and his assistant were directed or requested by the plaintiffs or defendants to perform such scaling, or whether they did it without request of either party, does not appear.

Lange and O'Harrow were requested by the boom master, and acted upon such request, and so far as any evidence in this record is concerned, the acts of said boom master and his assistant, as well as of Lange and O'Harrow, are as much the acts of the plaintiffs as of the defendants.

If this Court should be of the opinion that such scaling by Barney Hatch, *who was called boom master and employed in the business of scaling in said association*, and his assistant, or the scaling done by Lange and O'Harrow was contrary to the spirit of said contract, and therefore unauthorized, then such scaling is void and the case stands precisely as though such scaling had never been done at all.

The defendants were bound to raft up and secure all they could of said logs, and have performed that duty. But the boom master has neglected to do the scaling, and the parties have mutually neglected to select another scaler. The defendants could not make such selection alone, and the plaintiffs can take no advantage of a neglect which was as much his own as that of the defendants.

The logs have been rafted up and secured, but not scaled; not a log has been used or converted by the defendants, not one even removed from the association boom, so far as the evidence in the record shows or tends to show. A few that were scattered on the

shores of the lake, which had escaped from the boom, have been rafted up and brought to defendants' boom. This is all that has been done.

Under these circumstances, it is claimed that defendants have violated their contract and rendered themselves liable not only for all the logs so rafted up, but for all the logs which plaintiffs can prove to have been in the boom belonging to them at the date of the contract.

The statement of such a claim is its sufficient refutation.

On the contrary, it is insisted on behalf of the defendants, that if the scaler appointed by the parties neglected to act, and the logs rafted up by the defendants were not measured, so long as both the parties neglected to choose another person to do such scaling, the plaintiffs could not even recover for such logs as were rafted up, for the delay in the scaling is as much the fault of plaintiffs as of defendants.

There is no proof, therefore, of any violation of the contract by the defendants in relation to rafting or scaling said logs, and the ground upon which the claim of the plaintiffs to hold defendants liable in this suit for all the logs belonging to them in said boom at the date of the contract, and upon which claim the evidence of the measurement in the woods where said logs were cut (made before the sale) was based, entirely fails; and, therefore, no error was committed in excluding it.

The fourth exception stated in the bill of exceptions is an follows:

The said defendants, to prove the issue on their part, offered in evidence the depositions of one Dawson, and offered certain persons as witnesses, namely, Lange, Baker, Easton, J. Rudiman Truesdell, Mason, Ludlow, Myers, P. E. Trowbridge, I. Ryerson, R. O'Harrow J. Ruddiman, T. I. Waters and R. W. Morris, and offered to prove that the logs were of bad quality, unmerchantable and worthless. That the defects were for the most part latent and could not be discovered while the logs were afloat in the large boom, before they were rafted up, and after the logs had been in the water six months, the unmerchantable character of the logs

could not be discovered generally only by sawing them or cutting into them.

That after the logs had once been rafted up and taken out of the big boom, by the custom of lumber dealers, the logs could not be returned to the boom nor rejected and set adrift, but must be taken care of, and the only practicable way for defendants to dispose of them was by sawing them up wholly or in part, or laying them aside to be burned. To all this testimony plaintiffs objected, and the Court overruled the objection, and admitted the testimony.

The record then proceeds: "And the said Morris having been "produced and sworn, defendants asked him, what was the gene- "ral character of the pine in the section of the country where said "logs were cut? and offered to prove the same bad."

To this question plaintiffs objected, and the Court having overruled the objection, and admitted the evidence, excepted to the ruling.

The record then immediately proceeds. The defendants then gave testimony tending to show, that at the time of the purchase of the logs, they were afloat in the Association Boom, in Muskegan Lake, mixed with many millions of other logs.

The Court will observe, that in the portion of the record above recited, two objections of plaintiffs are stated, to testimony offered by defendants.

First: The deposition of one witness and the oral testimony of a number of others is offered for the purpose of proving "that "the logs described in the contract, were of poor quality, and un- "merchantable and worthless. That the unmerchantable quality "could not be discovered while the logs were in the water."

"And that, by the customs of lumber dealers, when logs were "rafted up in the said boom, the worthless logs could not be re- "turned to the boom, nor set adrift in the lake, but must be taken "out of the water and disposed of."

This testimony was objected to by plaintiffs, and the record states that the Court overruled the objection and admitted the evidence, no exception was taken to the ruling of the Court, at least

none shown in the record, nor does it sufficiently appear that the testimony so offered was actually given to the jury, for although the record states that the "Court admitted the evidence," this is immediately followed by this statement, "and the said Morris "(one of the witnesses whose testimony had been so tendered "and objected to,) being produced and sworn, was inquired of by "defendant's counsel." &c.

And upon examining the testimony of said Morris, it appears that his testimony was wholly different from the testimony so offered to be given by him and others, and objected to, indeed, upon totally different subjects.

It would seem, therefore, by the context, that the statement in the record, that the Court "overruled the objection and admit- "ted the evidence simply," means that the Court decided to admit it, for it appears that immediately after this decision the defendants called one of the same witnesses named by them in connection with the offer to prove the facts objected to, and that the testimony which he gave was upon wholly different subjects, and this construction is supported by the following statement in the record: After setting forth the first question to said Morris, and the objection thereto, and exception and ruling of the Court, the record proceeds, "and the defendants *by said witnesses*, gave testimony as follows, setting forth the testimony so given "*said witnesses*," can mean no other than the witnesses whose testimony had been previously objected to, and instead of testifying as stated in said proposition, their testimony is upon different subjects altogether.

The conclusion is that defendants offered to prove certain facts by certain witnesses whom he named; plaintiff objected; the Court overruled objection and decided to admit the testimony; these same witnesses were then called, but instead of testifying as had been prepared, gave testimony of a totally different character, and it was propably for this reason plaintiffs did not preserve an exception.

The objection taken to the testimony above recited, and not followed by an exception to the judgment of the Court overruling such objection, is not available to the plaintiff in error. Unless the objection is followed by such exception, it is deemed to be waived.

But as is above shown, the testimony objected to, does not appear by the record to have been given to the jury: on the contrary, the record, by setting forth the evidence given by the same witnesses, whose testimony was objected to, shows clearly that the particular testimony offered and objected to was dropped and abandoned and not given to the jury.

See Record, p. 16.

If the evidence to which objection is made, does not appear to have been actually given to the jury, the judgment of the Court admitting it even although erroneous, and although duly excepted to, cannot prejudge the plaintiff in error, and is therefore no ground of refusal.

The same answer may be given to the exception taken by plaintiffs to the ruling of the Court upon the question proposed to Morris, above referred to. The record, after stating the question and objection, and the judgment of the Court overruling such objection, state "that the Court admitted the evidence and plaintiffs "excepted." The record then immediately proceeds: "The de-"fendants by said witness (evidently meaning said Morris and those who had been tendered in connexion with him) tending to prove, "&c.," setting forth their testimony, which contains no answer to the question objected to, but relates to other matters.

This question, so objected to, does not, therefore, appear to have been answered, but on the contrary the record tends to show that it was not answered, and consequently it is contended that this exception can not be considered.

But if, in the opinion of this Court, it shall be deemed necessary to consider and determine the questions attempted to be raised by the fourth and fifth exceptions above recited, it will not prove a difficult task to vindicate the decisions and rulings of the Court therein stated.

The first of those decisions so objected to was upon the offer of defendants to prove that the logs mentioned in the contract were of inferior quality, unmerchantable, and worthless.

2. That the defects which rendered them unmerchantable could not be discovered before the logs were rafted up, and that

after they had been six months in the water it would be necessary to take them out of the water to determine such quality.

3. That when logs were once rafted up in said boom, the worthless logs could not (by the custom of the lumber dealers who owned and used it) be returned to said boom or set adrift, but must be taken care of.

This was in substance the testimony objected to, and decided by the Court to be admissible.

The plaintiff, who alleges the error in this judgment, must show it affirmatively, clearly and from the record.

Ventris vs. Smith, 10 *P.*, 161.

But as the record contains but the veriest shreds of the evidence given by the respective parties on the trial, it is impossible for this Court to ascertain the actual state of the facts and evidence as they appeared on the trial, or to understand the application of this evidence. According to the rules adopted by courts of review, however, every presumption not inconsistent with the facts actually contained in the record, will be indulged in favor of the rectitude of the decisions and judgments of the court below, and where the record does not purport to contain all the evidence given on the trial, or all upon the points involved in the rulings excepted to, the court of review will constantly presume such evidence to have been offered as would justify the rulings of the court below, unless indeed such evidence was excluded by the pleadings.

In such case, therefore, if the exception is to the actual admission of evidence, the error of such admission can only be shown when the pleadings themselves exclude the evidence. If the testimony here objected to and admitted by the Court, could have been rendered admissible by any state of the evidence admissible under the pleadings, this Court will presume that such proof was afforded as rendered such testimony admissible.

That the evidence under consideration is necessarily excluded by the pleadings will scarcely be contended.

The plaintiffs, by their declaration, seek to charge the defendants with all the logs of plaintiffs in the Association boom at the date of the contract of sale, and allege that all of said logs were

merchantable. They also allege neglect of the defendants in rafting up the logs and procuring them to be scaled. These allegations are traversed by the plea which is accompanied by a special notice of the bad quality of the logs. The testimony so offered, so far as it relates to the quality of the logs, is entirely within the issue.

By the effect of the contract set forth in the declaration, it became the duty of the defendants to raft up the logs, and either after or before such rafting, to separate the merchantable from the unmerchantable, and to receive the former and reject the latter. The question when such selection was to be made will be more fully considered hereafter. But certainly in determining the question whether the rafting up of the logs by the defendants was to be regarded as an acceptance, and in determining when defendants were bound to make their selections—questions which it is manifest were clearly within the scope of the pleadings—it was material to show what opportunity for inspection was necessary to determine the merchantable quality of the logs. As to the custom of the owners of said boom prohibiting the return of worthless logs after they were once rafted up, it is easy to see how this testimony might become material and admissible.

The plaintiffs proved that defendants had rafted up and secured over seven millions of said logs, and may have proved that defendants had removed the ratts containing such logs from the boom, and because defendants had not returned the logs, which they may afterwards have rejected, to the boom, may have claimed that such conduct was in law equivalent to an acceptance.

Under this state of the proof would it not be competent for defendants, having first proven that plaintiffs had dealt with and knew the customs of said Association, to show that they, defendants, were not permitted to return said worthless logs, and also that the manner in which they had disposed of them was the only possible mode under the circumstances.

The defendants may have rejected a portion of said seven millions feet, either before or after they were scaled, by taking them out of the rafts and floating them on shore, or placing them in any other situation to get them out of his way, and the evidence here offered would justify such disposition of them. The record nowhere

negatives such evidence, and as before stated, this Court will not call upon the defendant to do more than to show that such a state of the evidence may have existed under the pleadings as to render the testimony admissible.

It was the duty of the defendants to receive the merchantable and reject the unmerchantable logs. How they in fact signified or manifested such acceptance or rejection, the bill of exceptions utterly fails to state. However it may have been done, it certainly was competent for the defendants to show that they could not do it while the logs remained in the boom, and equally competent for them to show in what manner and at what stage of the business it was possible to make such division, and how they could dispose of the rejected logs, and the customs and rules of the Association governing the very business provided for in the contract, (the rafting up, scaling and disposition of said logs,) if known to the plaintiffs, was to be considered as part of the contract.

If the knowledge of the plaintiffs of such rules and customs be essential to the admissibility of proof of the same, this Court will, according to the rule of presumptions, in favor of the rectitude of the rulings of the Court below, presume such evidence to have been offered.

The rights and duties of the parties respectively under and by virtue of said contract of sale, will be further considered hereafter. Enough, it is believed, has been said to show that neither the pleadings in this case nor the facts contained in the record, will enable the plaintiffs to demonstrate that the evidence above objected to and admitted by the Court was incompetent.

Little need be said in vindication of the ruling of the Court overruling the objection to the question put by defendants to Morris, as to the quality of the pine in the section where these logs were cut.

Assuming that it was competent for defendants to prove the bad quality of the particular logs, it will require but little argument to show that the quality of the pine in the particular section where they were cut, and of course including the logs in question, is not irrelevant to the matter to be proved, and, although neither conclusive, nor, perhaps, the most convincing that could be obtained,

still, if not irrelevant, is admissible in the discretion of the Court.

The answer to the question is not given, which renders the exception valueless. But, aside from this answer to the exception, it is insisted that there may be many cases where this species of evidence would not only be admissible, but most important.

The quality of timber is greatly affected by soil and other local conditions. Timber trees in certain locations are subject to certain diseases and defects, pervading almost every individual tree within the influence of the local causes which produce them. In such cases the locality where the timber was obtained would furnish a natural and strong probability of defective quality. Whether such was the case in the present instance, the record fails to show.

But even if some portion of the testimony above objected to should in the judgment of the Court be incompetent and inadmissible, still, if any portion thereof is admissible, then the objection is too broad, and the Court did not err in overruling it.

The party excepting to testimony must, at his peril, point out in his objection the particular testimony at which such objection is leveled, and if the objection and exception are so broad as to cover evidence which is not liable to it, it is not error for the Court to overrule it.

More vs. Bank of the Metropolis, 13 *Pet.*, 302.
Elliot vs. Peirsol's Lessee, 1 *Pet.*, 328.

"The court is bound to do no more than respond to the motion to reject evidence, and grant or deny it."

A portion of the evidence objected to above, to wit: that relating to the unmerchantable quality of the logs, is clearly admissible, even if there should be doubt as to the competency of the balance.

The objection was therefore properly overruled.

The fifth exception in said bill of exceptions, is to the refusal of the Court of the prayer of the plaintiffs for certain instructions to the jury.

This prayer, although it sets forth five distinct instructions, is single, and was considered and rejected as it was made, as a single request and a single exception is taken and reserved in the bill of exceptions.

The prayer, and the action of the Court upon it, is stated as follows:

After the conclusion of the evidence in said case, the counsel for the plaintiffs requested the Court to instruct the jury as follows:

1. "That by the terms of the contract, the sale was of *the* "*whole quantity* of logs. (Their locality and position being known "to both parties. They being in the power of the defendants. "Their identification being complete, and nothing further to be "done by the vendor except something consequent upon the acts "of the vendee, in fulfillment of the contract, and that an incon- "siderable matter.) That the property passed by the sale, and the "defendants are responsible for the whole, as specified in the con- "tract, unless in fulfillment of the contract they exonerate them- "selves according to its terms from liability for a part. That, by "the terms of the contract, the situation of the property, as men- "tioned in it, and as it was in fact at the time, the whole quantity "of logs was delivered to the vendee. That all the delivery was "made which could be made of such property under the circum- "stances; it was put into the power and under the control of the "vendees, the intention was evident, and they so treated it by their "acts and conduct, and they became responsible, as stated in the "first charge requested.

3. "That the clause in the contract—'said Davis & Co. "agree to take and pay for all the merchantable logs at the rates "and on the conditions aforesaid,' gave the defendants a right to "reject any logs that were unmerchantable at the time they re- "ceived them into their raft and boom, and completed the scale, "and they were bound then to make their election and determina- "tion as to the merchantable character of the logs. That these "words, giving the defandants the right to reject unmerchantable "logs, do not constitute an implied warranty of the quality of the "logs. That there is no express warranty, and the plaintiffs are "therefore not responsible for any latent defects which the defend- "ants may subsequently have discovered in the logs after the same "were taken from the association booms, rafted up, scaled and "placed in defendant's boom by their agents and servants.

4. "That defendants, having received the logs into their "booms, and proceeded to saw up and dispose of a large portion "thereof without notice to the plaintiffs of any objection to the "logs so sawed up or remaining in their possession unsawed, they "cannot, in this action, claim a deduction from the prices of the "logs, on account of any alleged defects in quality, either patent "or latent.

5. "That the defendants, by the terms of the contract, were "to pay (and did in fact pay) for all the logs rafted up in the fall, "by the 15th day of December, then next, and were to pay for "those rafted up in the spring, at the end of each month's rafting, "and for the balance as soon as the scale of those not rafted should "be completed; and, therefore, were bound to pay for the logs at "those times, and then to make their election of such as were un-"merchantable. They were then to take and pay for such as were "merchantable, and were to pay as they were rafted up and scaled; "that if they did not then reject any logs as unmerchantable, they "they could not afterwards; and after the right of action for the "price was fixed, claim deduction for defects discovered in subse-"quent sawing—there being neither fraud nor breach of warranty "in the case.

"And the said court refused so to instruct the said jury, to "which refusal the said plaintiffs did then and there except."

To render this exception available for the purpose of reversing the judgment, it must affirmatively appear *from the record* that the plaintiffs were entitled to these precise instructions.

It will not avail that the principles of law asserted in them are correct in the abstract, it must also affirmatively and clearly appear from the facts stated in the record, that they were applicable to the case and necessary to guide the determination of the jury.

These instructions being all presented together, and at once, and the Court requested to consider and adopt or reject them altogether, had a right to consider them as they were presented, and was not bound to separate them, and consequently if any one or number of said instructions were erroneous, he might properly refuse the request to give them.

He was bound only to respond to the request as it was made, and either grant or refuse the prayer to give all the instructions embraced in it.

The plaintiff was either entitled to all of said instructions according to said request, or he was entitled to none of them. The Court was not requested to give to the jury one or a number of said instructions, but to give them all, and consequently his refusal was not to give one or a part thereof, but to give them all, and it was to his refusal to give all these instructions to which exception was taken.

It was optional with the plaintiff, in his discretion, to request the Court to pass upon each of said instructions, separately, and to take his separate exceptions to the ruling of the Court upon each, or he might unite them all in one prayer, and treat them as a single instruction, and having elected the latter mode of tendering them, and taken a single exception, it follows that if any of said instructions or any part thereof was properly rejected, then the exception is too broad.

Exceptions, whether taken to testimony or to instructions given or refused by the Court, must point out the errors at which they are levelled, and if they are so taken as to cover and embrace matters, only a portion of which are erroneous, such exceptions are not available to reverse the judgment.

But even if the plaintiff were entitled to the advantage of a separate exception to each of the instructions so rejected, it would not avail him, because, as it is confidently believed, the plaintiff was not entitled to either of said instructions.

The Court is only required to instruct the jury in the law of the case, it is not bound, even if it is at liberty to instruct them upon the facts or the inferences of fact, nor to state or comment upon the evidence or the effect thereof, further than may be necessary to show the application of the principles of law, nor is the Court bound to analyze, revise and correct these several statements and propositions submitted to it by counsel, and to divide and separate the portions which are correct and applicable from such as are incorrect and inapplicable, but is at liberty, on the contrary, to treat and consider the proposition offered as whole and entire, and un-

less every part of such proposition is applicable and correct, to reject it.

Smith vs. *Carrington*, 4 *Cranch*, 62.
Vealet vs. *Patten*, 5 *Cranch*, 142.
Brooks vs. *Marbury*, 11 *Whea.* 78.
Cutts vs. *Peelan*, 2 *How.*, 378.

It follows, therefore, that to render the refusal of instructions requested by the plaintiffs in error available to reverse the judgment below, the whole of such instructions must consist exclusively of matter of law, and must affirmatively appear from the record to be correct and applicable to the case, as shown by the evidence recited in the record.

It will be found upon a careful examination of these instructions, that each and all of them are exceptionable, either because they contain matters of fact as well as law, or because they are not shown to be applicable to the case, or are erroneous in law, and that they were therefore all properly refused.

1. The first of said instructions purports to contain a recital of facts existing at the time of contract of sale, to wit:

"That the locality and position of the logs were known to both "parties; that they were in the power of the defendants; that "their identification was complete; that nothing further was to be "done by the vendor, except something consequent on the acts of "the vendee in fulfillment of the contract, and that an inconsider-"able matter," and then proceeds to assert the proposition that by the terms of the contract the sale was of the whole quantity of logs; that the property passed by the sale, and the defendants were responsible for the whole as specified in the contract, unless in fulfillment of the contract they exonerate themselves according to its terms from a part.

Whether the facts recited in this instruction were true or not, the plaintiffs had no right to demand and require the statement of them by the Court; for, while it may not be erroneous or improper for the Court to rehearse the facts of the case admitted by the parties or proved on the trial, and to comment on them, he is not bound or required to do so, and may properly, in his discretion,

refuse to make any statement of facts to the jury. It may be very clear, from the record in this case, that the locality and position of the logs were known to both parties; that they were in the power of defendants; that their identification was complete; and that what remained for the vendors to do was a small matter; still, these are matters of fact and not of law, and whether true or not, the Court could exercise its discretion as to making such statement.

Whether the proposition contained in said instruction, that the sale was of the whole quantity of logs, and immediately passed the title of the same to the defendants, and rendered them liable for the price thereof, will be considered hereafter.

2. The second instruction so required by the plaintiffs asserts the following propositions of fact: "From the situation of the "property mentioned in it, as it was in fact at the time, the whole "quantity of logs was delivered to the vendee; that all the delivery "was made that could be made of such property under the circum-"stances. It was put into the power and under the control of the "defendants. The intention was evident, and they so treated it by "their acts and conduct. Therefore they became responsible" (as stated in the first charge.)

This instruction consists wholly of matter of fact, except the last clause, which consists of a repetition of a portion of the first instruction. It can scarcely be necessary to discuss the question of the right of the Court to refuse such an instruction without regard to the truth or falsity of the facts therein stated.

3. The third instruction so required by the plaintiffs professes to offer a construction of that clause of the contract of purchase which provides that "said Davis & Co. agree to take and pay for all the merchantable logs at the rates and on the conditions aforesaid," and asserts that said clause gave the defendants the right to reject unmerchantable logs at the time of receiving them into their raft and boom, and not afterwards; that it does not amount to an implied warranty of the quality of the logs, nor render the plaintiffs liable for latent defects which might be discovered by the defendants after receiving them into their boom.

This instruction contains only matter of law, and is not, therefore liable to the same objection herein urged to the first and

second instruction; but, although not liable to the same objection, it is at least equally objectionable, and was, as the defendants insist, properly refused.

This instruction asserts, as an inflexible rule of law, that under this contract the right of the defendants to reject unmerchantable and worthless logs is limited to the time when said logs are received into defendants' rafts and boom; because, from the nature of the case and the course of business, as shown by the record, they could not reject them before they were rafted up, and by the said instruction they could not do so afterwards. The right of the defendants to reject such logs as might prove to be unmerchantable and worthless under this contract, and the times at which they might exercise such right, will be fully considered hereafter. At present, I will only state that the defendants claim under the above clause a reasonable and sufficient opportunity to ascertain the quality of said logs, and insist that whether such sufficient opportunity of inspection is afforded while the logs remained in the water or not is a question of fact to be determined by the jury upon the evidence in the case.

4. The fourth instruction recites the following facts: "That "the defendants have received the logs into their boom; that they "had proceeded to saw up and dispose of a large portion thereof, "without notice to the plaintiffs of any objection to the logs so "sawed up, or remaining in their possession unsawed;" and further asserts, as matter of law, that they cannot claim in this action a deduction from the prices of the logs on account of any alleged defect in quality, either patent or latent.

Besides the objection before urged to several of the previous instructions, that they embrace matters and statements of fact as well as law, this instruction is liable to the further objection that the record contains no evidence showing or tending to show that the facts recited in this instruction were proved, or any evidence offered tending to prove them.

The instruction recites that the defendants had received the logs into their boom and sawed up and sold a large portion of them.

The only evidence offered on these subjects, so far as the record shows, is this:

"The plaintiffs then, by the books of the said Association, "gave evidence tending to show that defendants had rafted up and "secured, of the logs which were described in said contract, 760,719 "feet." There is no evidence in the record, therefore, tending to show that the defendants had received "the said logs," (meaning the whole quantity described in the contract,) into their boom; on the contrary, it appears by the record that they so rafted but a portion of them; nor is there any evidence tending to show that defendants had sawed up, much less that they had sold any of them.

As there is no evidence in the record to justify such a recital of facts by the Court, and as the proposition of law with which the instruction concludes is the mere conclusion from the facts so recited, it follows that the Court rightly rejected the whole instruction.

5. The fifth and last instruction so requested by the plaintiffs, first recites a clause of the contract, fixing the times when the logs were to be paid for, and asserts the fact that "defendants did so "pay for them," and in the second place repeats in substance the assertion contained in the third instruction, that the defendants could not, under the contract, reject any logs as unmerchantable, after receiving them into their rafts or boom, nor claim any deduction on account of defects subsequently discovered.

The introduction, in this instruction, of the statement that defendants did pay for the logs delivered in the fall of 1857, being a mere matter of fact, and one which does not appear by the record to have been proved in the trial, justified the Court in refusing and rejecting the whole of it. As to the matter of law contained in the instruction, denying the right of defendants to reject unmerchantable logs, after receiving them into their rafts or boom, or to recover for defects afterwards discovered, first stated in the said third instruction, and repeated in the last one, it will (as before remarked) be considered hereafter.

From the above examination of the instructions asked by the plaintiff and refused by the Court, it appears that each of them, except the 3d, contains an intermixture of fact and law, and that many of the facts stated or recited in said instructions are wholly unsupported by the recital of the evidence in the record, and that besides such recitals and statements of facts, and rehearsals of the

different clauses of the contract of sale, the said instructions contain in substance merely the following general propositions:

1. That by the terms of the contract, the sale was of the whole quantity of logs. That the property passed by the sale, and defendants are responsible for the whole, unless in fulfillment of the same (contract) they have exonerated themselves from a part.

2. That all the delivery of the property which was possible, was made at the time of the contract.

3. The defendants had a right to reject such logs as were unmerchantable, at the time of receiving them into their rafts and boom, and not afterwards, nor are plaintiffs responsible for any defects afterwards discovered.

4. The defendants cannot, in this action, claim a deduction from price of logs on account of defects patent or latent.

5. A mere repetition of the 3d instruction.

Now, if the above propositions had been separated from the matters of fact with which they are improperly mixed and blended in the said instructions, and in proper form proposed as instructions to the jury, we should still insist that they were each and all properly rejected.

The fourth of said propositions, asserting that defendants cannot, in this action, claim a deduction from the price of the logs on account of defects patent or latent, must be taken to mean simply, that defendants are bound to pay for all the logs mentioned in the contract at the price therein mentioned. For certainly he can claim no deduction on any other account than defects either patent or latent.

Taken in this sense, the proposition needs no discussion, and if it is to be understood in any other sense, it is too vague and equivocal to be proper or admissible.

The substance of the 1st, 2d, and 3d of said propositions may all be expressed in the following:

1. The contract amounts to an executed sale of all the lumber of plaintiffs in the association boom.

2. And to a delivery of the same to defendants.

3. And the defendants thereupon became liable for the whole at the contract price, except such as they should reject as unmer-

chantable at the time they were received into their raft and boom.

Now, to justify the plaintiff in demanding such instructions thus unconditional in their expression, the truth of the propositions so stated must appear from the simple reading of the contract referred to in them, and be wholly independent of the evidence in the case. For inasmuch as neither the facts nor evidence in the case is referred to in the instructions, he first of the above propositions, that the sale was of the whole quantity of logs, is contrary both to the letter and spirit of the contract, and is contradicted of record by allegations of the plaintiffs in both the counts of the declaration.

By the terms of the contract, the defendants agree to *take and pay for all of the logs that are merchantable*, and the plaintiffs, in stating the legal effect of the contract, allege, in one count, that it was agreed betwen the parties that the defendants purchased of the plaintiffs, and the plaintiffs sold to defendants all the merchantable logs in a certain quantity of logs, &c.; and in the other count, that plaintiffs agreed to sell to defendants, and defendants agreed to buy of plaintiffs all the merchantable logs, &c.

Whether the contract was executed or executory, therefore, the sale was not of the whole quantity of logs, but only of the merchantable logs.

Besides, the plaintiffs admit, and in the third and last instructions requested by them, ask the Court to instruct the jury that defendants have a right to reject all the unmerchantable logs; but insist that this right can only be exercised at the time of receiving the logs into their raft and boom. This admission, of a right to reject a portion of the logs, is certainly inconsistent with the assertion that the sale was of the whole quantity of logs; for if this were true, the logs rejected would still belong to defendants, the same as those retained.

The next proposition, that the title of the logs passed at the date of the contract, will be considered in discussing the charge actually given by the Court.

The next assertion is, that defendants, by the execution of the contract, became responsible for the whole quantity of logs, &c., unless in fulfillment of it they exonerate themselves from a part.

This assertion is clearly opposed to the very language of the contract above quoted, in which they agree to take and pay for all the merchantable logs, which language, by force of the maxim of construction, *expressio unius est exclusio altereus* as clearly excludes and denies all responsibility for such logs as are not merchantable, as though a clause of exclusion had been inserted in the contract.

The next proposition is, that all the delivery of the logs that was possible, was made at the date of the contract.

This proposition, whether true or not, is strictly matter of fact and not of law, and therefore not proper subject of instruction.

Whether delivery of property is possible or not, depends upon its character, weight, size, &c., and its situation. All these are matters of fact, purely to be judged of by the jury.

In the present case, if the meaning of plaintiffs is that no delivery of the property constituting the subject of the contract was possible at the date of the contract, and therefore none was made, all that is necessary to say is, that they have failed to express that meaning, and consequently failed to express the truth.

The subject of the contract of sale was the merchantable logs in a certain quantity of logs, belonging to plaintiffs, in the boom.

They were incapable of delivery at the date of the contract, because they had not been separated from the unmerchantable logs of the same mark, with which they were mixed: and, therefore, to say that all the delivery was made that was possible, would amount to a statement merely that no delivery was made.

The third proposition, "that defendants were at liberty to reject such logs as were unmerchantable at the time of receiving them into their rafts and boom, and not afterwards, and cannot recover for defects afterwards discovered, will be considered in discussing the charge of the Court as given.

The fourth proposition, "that defendants cannot, in this action, "claim a deduction from the price of logs on account of defects "patent or latent," is entirely irrelevant.

The question is not raised, either by the pleadings or proof reserved in the record, whether defendants can claim a deduction

from the price of such logs as they actually agree to receive and pay for on account of defects.

They agree to receive logs of a certain quality and description only, at prices fixed by the contract, and no deduction is claimed on the price of such logs. The evidence of the bad quality of the logs was introduced, not for the purpose of enabling defendants to claim a deduction upon the merchantable logs but to justify their refusal to receive and pay for such as on account of bad quality they had refused to receive. The plaintiff, in drawing his bill of exceptions, has inserted in it so little of the evidence, as to leave it uncertain whether any of the logs were ever received by the defendants.

The only evidence touching this subject, contained in the record, is that "defendants rafted up and secured" over 700,000 feet of said logs, according to the account of the scaling kept by the Lumberman's Association, and that of this number, a few which had escaped from the boom and been rafted up from the shore of the lake had been taken by the raftsmen direct to the mill boom of defendants.

It will be easily seen that there was no other mode in which the logs so rafted from the open shore of the lake, could be secured from loss and dispersion, after they were rafted up, except to take them to some boom for safe keeping. They were gathered up one or a few in a place, over the whole coast, and in order to secure the rafts into which they were gathered, they must be taken into some boom.

From this it appears that the evidence shows no farther interference of defendants with said logs, than was required to raft up and secure them. Now defendants were expressly bound by the contract, to raft up and secure all they could of said logs between the date of said contract and the coming down of the drive of logs in the spring of the next year. According to this provision, defendants had rafted up and secured over 700,000 feet, and here the record stops.

This Court, in examining and determining the questions which arise in the case, can receive no evidence, except what is found in

the record, and it is clear that the record fails to show the receipt or acceptance by the defendants, of a single log.

It is not contended by the plaintiff that defendants were bound to make their selection of the merchantable logs, until they received them into their booms, and with the exception of the few taken there for safety, not a log appears to have been so received, and certainly this Court will not, for the purpose of overthrowing the judgment below, assume a fact which does not appear of record. Now, unless the defendants had actually received and accepted the said logs, or a portion of them, the principle here asserted can have no application.

The sixth and last exception taken in said bill of exceptions, is to the entire charge of the Court as given to the jury; the exception is general, and designates no part or portion as erroneous.

The practice of excepting to the entire charge of the Court, and requiring it to be spread upon the record *in extenso*, as in this case, has been reprobated in this Court.

Evans vs. Eaton, 7 *Wheat.*, 356.
Ex parte Crane, 5 *Pet.*, 190.
Carver vs. Jackson, 4 *Pet.*

The practice is not generally allowed in the State Courts, and where the exception is to the entire charge, only a portion of which is claimed to be erroneous, upon the general principles applicable to exceptions it ought to be held bad.

But if the exception so taken to the entire charge should be deemed effectual to require an inspection of the whole charge, and a review of the principles of law stated in it, then it devolves upon the plaintiff in error to demonstrate, not only the errors of which he complains, but also to show conclusively that they were of such a character as to injure them; mere abstract or theoretical errors will not justify a reversal of the judgment.

The principal error of which the plaintiffs appear to complain, is in that portion of the charge which declares the said contract to be executory and not an executed contract.

Much labor was bestowed upon this question in the Court below, and many authorities cited by plaintiffs to show that said contract imported a present sale, and vested the title of said logs im-

mediately in the defendants. The language employed in the contract itself is certainly equivocal, for while it commences by reciting that defendants "bought" of plaintiffs a certain quantity of logs, describing them, it closes with a provision that defendants agree to take and pay for all the merchantable logs in said lot or quantity.

The plaintiff in his declaration has, in one count, attempted to declare upon it as an executed, and in the other as an executory contract. It is clear, however, that in this attempt he has failed, for it will be discovered, upon examining the two special counts of said declaration, that they are in substance precisely alike.

The only difference in the language of the counts is as follows: In the first count it is alleged that the parties entered into an agreement by which it was agreed "that defendants bought of plaintiffs, and plaintiffs sold to defendants all the merchantable logs in a quantity of pine saw-logs," &c. And in second count, "that in said agreement plaintiffs stipulated for and agreed to sell, and the defendants bargained for and agreed to buy all the merchantable logs in said quantity."

These clauses purport to be mere recitals of the agreement, and in both of said Courts the executory terms of said agreement are set forth in the same language. In both of the said counts it is alleged that said logs were delivered by said plaintiffs to said defendants *not at the date* of the said contract, but during the then current fall.

No delivery of the logs at the date of the sale is alleged in either count of the declaration, on the contrary the subsequent delivery during the then current fall, is alleged. What substantial difference can be shown between these counts?

To constitute a complete sale of real or personal property, there must be a delivery, actual or constructive, and in pleading this distinction does not exist, every delivery is alleged to have been actual.

By omitting in the first count, to allege a delivery at the date of the contract, and alleging a delivery during the then current fall, the plaintiffs have treated the contract as executory.

Both of the counts of said declaration are upon an executory agreement.

This count will hardly reverse the judgment of the Court below, on the ground that the Court instructed the jury in accordan with the allegations of the declaration of the plaintiff in error.

But the contract does not necessarily import an executed sale. The property to be conveyed is all the merchantable logs in a certain quantity of pine saw logs, described.

The contract provides no mode in which the merchantable shall be separated from the unmerchantable logs.

This separation must of necessity precede the delivery of the merchantable logs. How or by whom the selection should be made is not determined by the contract.

The defendants agree to *take* all the merchantable logs, but before they can take them they must be identified. Something must be done to discriminate them from the unmerchantable logs with which they are mixed. At the date of this contract, these logs were not only mixed with the unmerchantable logs of the same mark, but with many millions of other logs, the whole being in the actual possession of the said Lumberman's Association. The possession of said Association was in law the possession of plaintiffs.

The duty of rafting up *a part of these logs only*, was assumed by defendants. They agreed to raft up all they could by a given time, the rest of them were to be sealed where they were, as far as they could be found. Much was said below, in reference to the relative situation of the parties in respect to the logs. This consideration can have no weight.

The plaintiffs were non residents, but had an agent on the spot [show] who executed the contract, and had the custody of the logs as fully after the contract as before. The only duty assumed by the defendants previous to taking the logs, consisted in rafting up a part of them. Whether they were bound to raft up any more than the merchantable logs, does not clearly appear from the contract, but by the evidence of the course of the business of rafting, it is manifest that the whole must be rafted, as the discrimination could not be made before rafting. This process, so far as it was done, would separate the logs from those of other owners, but not from the unmerchantable logs. From this examination of the contract and evidence, it appears that no means whatever is provided

for separating and discriminating the merchantable logs which defendants were to take from the unmerchantable, which they were to leave; nor does the record show in what manner it was attempted to be done. It may have been governed by some local custom proved on the trial.

The boom master, who was charged with the duty of sealing the logs, may be empowered by custom to inspect them and determine their quality under such contracts. If so, he would, in making such inspection, be regarded as the agent of both parties. But whether this inspection and discrimination of the merchantable from from the unmerchantable logs, was intended to be done by the boom master or by the parties themselves, it was not necessary to be done before the actual delivery to defendants. This act involved the exercise of judgment and discrimination, and was equally for the benefit of both parties.

Suppose the contract contained an express provision, "that be-"fore the said defendants *take*" such merchantable logs the whole quantity of logs shall be carefully inspected, and the merchantable logs separated from the unmerchantable; upon whom would the duty of procuring such inspection devolve? and in what capacity would the inspector act? and finally what would be the effect of such a provision upon the question whether the title of any logs passed before such inspection? clearly, it would devolve upon the plaintiffs as much as the defendants, under such a provision, to procure the inspection to be made, and they would be unable to maintain any action for the neglect of defendants to receive and pay for such merchantable logs, unless they could show that they had at least offered to co-operate with defendants in procuring such an inspection as was necessary to identify the logs which defendants were bound to receive, and it is equally clear that the title would remain in plaintiffs until such inspection and identification. The person chosen to make such inspection, however selected, would be regarded as the agent of both the parties, because the act is one in which both are equally interested. Even if such inspection and discrimination were by consent entrusted to one of the parties, this fact would not change the nature of the act; in making such inspection and determination he would be regarded in law as the agent of the parties.

But such an inspection of the logs and separation of the merchantable from the unmerchantable, is indispensable to the performance of the express terms of this contract, and being necessary, must, by the ordinary rules of construction, be implied. If the defendants cannot take the merchantable logs and leave the unmerchantable without a previous inspection, such inspection must be implied; such inspection, by whomsoever made, is the joint act of the parties.

The distinction between executory contracts for the sale and purchase of property, and executed contracts of sale, is sometimes matter of great embarrassment and difficulty, and has been drawn into discussion as frequently as almost any other question whatever.

An unlimited number of adjudicated cases, more or less in point, might be cited, but it is believed that when the situation of the property in question here is considered, and the course of business necessary to be pursued by the parties in perfecting the transfer provided for in the contract, that very little authority will be needed to demonstrate that the title of the logs did not pass by the contract.

If, before the defendants took the merchantable logs in the lot of logs described, it was necessary to select such logs from the said lot or quantity, and if such selection necessarily implies the exercise of judgment and discrimination, then it follows that the identity of the logs intended to be conveyed, remained thereafter to be determined, and that determination dependent not on the mere exercise of the physical senses, as the selection of logs with a particular mark, recognizable by mere sight, but dependent upon the exercise of judgment and reason, and therefore subject to uncertainty. The words, merchantable quality, when applied to any kind of property, imply several particulars, and relate not only to the essential nature and qualities of the property, but to the requirements of the market, and it needs no argument to show that the determination of such a question is judicial, requiring the exercise of reason and comparison.

The true construction of the contract is, that defendants agreed to take such logs out of the whole quantity, as should be adjudged and determined to be merchantable.

Because such a judgment must precede the taking, by whomsoever the act of judgment is exercised, its nature is the same, and must equally determine the identity of the logs; it is precisely as though they had agreed to take such logs as it should decide to be merchantable.

The doctrine of the elementary writers upon the subject, is, "That the sale is not completed until the happening of "any event expressly provided for; *or*, so long as anything re- "mains to be done to the thing sold, to put it in condition for sale, "or to identify it, or to discriminate it from other things, or to de- "termine its quantity, if the price depends upon quantity."

1 *Parsons on Contracts, p.* 441.

The identity of the property depended in this case upon an act of judgment to be thereafter performed, and consequently was at the date of the sale necessarily uncertain.

There are a number of cases which hold that where nothing remains for the vendor to do or only a trifling matter, the title may pass, if such an intention is manifest; but in this case an act is to be performed in which the plaintiffs are as much interested as the defendants, and as the contract is silent as to the party by whom it is to be done, it devolves as much on the plaintiffs as the defendants, and that even if done by defendant, it is in the capacity of agent of plaintiffs, as well as in his own right.

But it is insisted that—independently of the question, who by a fair construction of this contract is bound to procure such inspection and identification—that no authority can be found to support the doctrine that a sale can be completed while the identity of the property remains to be ascertained by a judicial determination.

Even if the decision of this question were shown to be erroneous, the error is merely theoretical, and could work no prejudice to the plaintiffs.

Neither the price of said logs, or time of payment, depend upon this question, nor the duty of defendants as to rafting up the logs.

If the sale is regarded as executed at the date of the contract, the title to the merchantable logs was vested in defendants, but

they were bound to pay for them only so fast as they were rafted up and scaled, nor would they then be holden to pay for any logs not merchantable, for such only were purchased.

Looking at the record for the purpose of determining whether this error was injurious to the plaintiffs, we learn only this, that defendants had rafted up and secured 700,000 feet of said logs, but are wholly unable to learn whether there remained any logs not rafted, or whether of those thus rafted the defendants had made any selection or discrimination of the merchantable from the unmerchantable, nor are we able to learn in what months they had been rafted, and consequently whether the time for such selection had elapsed or not. Indeed, the bill of exceptions is so entirely defective and insufficient, that it is impossible from it to see the application of the point under discussion.

The Court further instructed the jury that the measurement of the logs was equally for the benefit of both parties, and that it was equally incumbent on the plaintiffs and defendants to procure it to be done, and that if the jury found from the evidence that it required the co-operation of two or more to do the scaling, and that it was usual for the boom-master to have assistants, then the scaling and measurement might be lawfully done by such assistants under the direction of the boom-master. This portion of the charge is so manifestly correct as to need no vindication.

The Court further instructed the jury that the plaintiffs could recover in this suit only for such logs as had been scaled and come to the possession of defendants.

By the terms of the contract, the defendants agreed to take and pay for the merchantable logs, according to a measurement thereafter to be made, they are bound by the contract, therefore, to pay for only such logs as should be scaled in the manner provided by the contract, and received by them, and as the record contains no evidence of any violation of the provisions of the contract by them, they can only be held liable according to its terms.

It is not deemed necessary to repeat the entire charge and attempt a vindication of all the principles asserted in it.

There are some portions of it, however, which conflict with the

instructions requested by the plaintiffs, and which it seems necessary, therefore, to consider.

The Court instructed the jury, in effect, that if, from the evidence, they were satisfied that the merchantable or unmerchantable quality of the logs could not be determined while the logs were in the water, then the defendants might for that purpose take them out of the water, and might take such measures in general as the evidence convinced them was necessary to determine the quality of the logs.

It was contended by the plaintiffs, and they asked the Court to instruct the jury, that the right of rejection of any of said logs as unmerchantable, was confined to the period of time when they received logs into their rafts and boom, and in support of this position they cite the provision of the contract requiring the defendants to pay for all the logs which they receive substantially at the end of each month's rafting, which it is insisted fixes the time within which the selection must be made.

Even if it were conceded that the defendants were bound to decide during each month upon all the logs rafted up and scaled in that month, and accept or reject finally before the time for payment arrived, this would not preclude them from employing within that time, any of the means mentioned in the charge, during the month. The charge relates to the means, not to the time of determining the quality.

But the Court refused to instruct the jury that this right of selection and rejection was confined to the time of receiving the logs into their raft or boom, and this was the only decision in regard to the time when defendants were bound to reject for unmerchantable quality.

He decided that the right of rejection was not confined to the moment of receiving the logs into their rafts or boom, but did not decide or intimate that it extended beyond the time of payment.

He decided that defendants might use all necessary means to determine the quality, and were not confined to the hour and moment of receiving the logs into their rafts and boom.

The evidence tended to show that the quality could not be decided while the logs were in the water, and to require the defendants to decide and determine their quality while they were in the

water would be to deny them the means and opportunity of doing what they were so required to do.

Why should the defendants be denied an opportunity to inspect those logs? The evidence shows that when the contract was made they were wholly inaccessible to examination. The defendants made the contract in ignorance of their quality, agreeing to take only the merchantable logs, and it appears that this agreement can not be executed in a manner to secure the fair rights of the parties while the logs remain in the water. Why, then, should not the defendants have the right to take them out of the water? But this cannot be done until they reach defendants' mill, where they have machinery for the purpose.

In the boom of the Association and in the defendants' boom, they are of course in the water, and no effectual inspection is possible.

The charge of the Court, that defendants were entitled to reasonable opportunity of inspection, is therefore correct, and his refusal to instruct that defendants were bound to make such inspection before they received the logs into their rafts or boom, was simply a refusal to charge that they were to exercise the right of selection before they had such opportunity.

But the Court also instructed the jury that the provisions of the contract were equivalent to a warranty of merchantable quality of the logs.

This instruction would be better understood, and the application of it would appear, if the evidence given on the trial had been preserved in the record. The instruction was given with reference to the right of the defendants to reject logs for defect of quality and in this view was manifestly correct.

The right of the defendants to reject the unmerchantable logs, and the time and mode of exercising that right, are exactly the same as on a sale with warranty of merchantable quality. The plaintiffs have inserted so little of the evidence offered on the trial as to furnish but a faint and imperfect idea of the questions actually submitted to the jury, but enough appears in the record to show that the principal question was when and under what circumstances the defendant was at liberty to exercise his right of rejection, and the only application of this instruction was to that question; and in that application, the instruction, it is respectfully submitted, is correct.

The only remaining portion of said charge which it is deemed necessary to notice, is the instruction of the Court, that in substance, if the jury should find, from the evidence, that the unmerchantable logs were entirely worthless, the defendants might, without notice to the plaintiffs of their rejection, and without restoring the logs to them, recoup, by way of damages, the price of the same.

No facts are set forth in the bill of exceptions to which this charge is in any degree or manner applicable, and therefore it is impossible to see from the record that the plaintiffs were injured by it if erroneous.

The instruction, however, is not erroneous. If the logs were entirely worthless, the return of them to plaintiffs, or notice to them of the rejection, would be an idle and useless labor, which is never required by the law, and the defendants would have the right to reject such logs, and without return or notice of the rejection, recoup or deduct from the whole price of the logs so rejected.

Can it be pretended that if upon an examination of those logs after they arrived at defendants' boom, a portion of them were found to be wholly worthless, the defendants could not reject them and withhold the price without returning them? To whom, and where, should he return them? Not to the boom, for there it is shown they would not be received. They could not even be set adrift in the lake, and the defendants have shown that by the rules and customs of the lumber dealers, there was no other way of disposing of worthless logs but by taking them out of the water altogether, and the usual mode was to burn them.

The bill of exceptions contains no evidence tending to show that either of the above instructions had any application to the case. Indeed, the bill of exceptions is utterly silent as to any evidence or claim of damages by the defendants, or, indeed, of any receipt or rejection of said logs.

The Court, in reversing the judgment upon the ground of error in said charge, must assume its materiality.

In conclusion, the defendants say that no material error is to be found in said record, and the judgment should be affirmed.

WALKER, VAN ARMAN & DEXTER.

The only remaining portion of said charge which it is deemed necessary to notice, is the instruction of the Court, that in substance, if the jury should find, from the evidence, that the unmerchantable logs were entirely worthless, the defendants might, without notice to the plaintiffs of their rejection, and without restoring the logs to them, recoup, by way of damages, the price of the same.

No facts are set forth in the bill of exceptions to which this charge is in any degree or manner applicable, and therefore it is impossible to see from the record that the plaintiffs were injured by it if erroneous.

The instruction, however, is not erroneous. If the logs were entirely worthless, the return of them to plaintiffs, or notice to them of the rejection, would be an idle and useless labor, which is never required by the law, and the defendants would have the right to reject such logs, and without return or notice of the rejection, recoup or deduct from the whole price of the logs so rejected.

Can it be pretended that if upon an examination of those logs after they arrived at defendants' boom, a portion of them were found to be wholly worthless, the defendants could not reject them and withhold the price without returning them? To whom, and where, should he return them? Not to the boom, for there it is shown they would not be received. They could not even be set adrift in the lake, and the defendants have shown that by the rules and customs of the lumber dealers, there was no other way of disposing of worthless logs but by taking them out of the water altogether, and the usual mode was to burn them.

The bill of exceptions contains no evidence tending to show that either of the above instructions had any application to the case. Indeed, the bill of exceptions is utterly silent as to any evidence or claim of damages by the defendants, or, indeed, of any receipt or rejection of said logs.

The Court, in reversing the judgment upon the ground of error in said charge, must assume its materiality.

In conclusion, the defendants say that no material error is to be found in said record, and the judgment should be affirmed.

WALKER, VAN ARMAN & DEXTER.

SUPREME COURT

OF THE

UNITED STATES:

DECEMBER TERM, A.D. 1861.

NO. 139.

FREDERICK B. LEONARD AND CHAUNCEY P. IVES,
VS.
CHAUNCEY DAVIS, ALFRED E. LOOMIS, JOHN C. DORE AND THEODORE NEWELL.

ERROR TO THE U. S. CIRCUIT COURT FOR MICHIGAN.

BRIEF FOR PLAINTIFFS IN ERROR.

DETROIT:
H. BARNS & CO., PRINTERS.
Nos. 52 & 54 Shelby Street.
1862.

53

Supreme Court of the United States:

DECEMBER TERM, A.D. 1861.

NO. 189.

FREDERICK B. LEONARD AND CHAUNCEY P. IVES,
vs.
CHAUNCEY DAVIS, ALFRED E. LOOMIS, JOHN C. DORE AND THEODORE NEWELL.

ERROR TO THE U. S. CIRCUIT COURT FOR MICHIGAN.

BRIEF FOR PLAINTIFFS IN ERROR,

(WHO WERE ALSO PLAINTIFFS BELOW.)

The questions presented in this case arise upon bill of exceptions to the rejection and admission of testimony, and to the giving and refusal of instructions to the jury.

The action is assumpsit for purchase money upon a written contract of sale of a quantity of saw logs.

A preliminary statement will assist the presentation of the case.

The Muskegon is a river of Michigan, which flows westerly into lake Michigan. Shortly before it empties, it widens into a small lake, called Lake Muskegon, which communicates with Lake Michigan. In the region round about, lumbering is the chief interest, and there exists in the neighboring settlements a corporate body called the "Lumbermen's Association." This body had constructed a "*boom*" or floating enclosure of logs chained together and made stationary, near the point where

the river expands into a lake, for the purpose of receiving all the logs belonging to various owners, which might be felled upon the upper Muskegon and its tributaries, and floated or "driven" down the river, during the high water in the spring in the annual "spring drive." One of the objects of the Association, was to make contracts for driving down logs as well as receiving them. The logs were, subsequently, counted and "*scaled*" *i. e.* the number of feet board measure was ascertained, in the woods, where cut; were branded, or cut, with the owners' mark, and, after their arrival in the "big boom," as that of the Association was called, those of each owner were "*rafted up*," *i. e.* made into separate collections or rafts, scaled by a superintendent of the big boom, called the boom-master, and then floated away into the smaller and private booms connected with the various mills in the vicinity belonging to the different owners of the logs. Some of the logs, after coming down the river, might be deposited from subsidence of the water, or other causes upon the banks and in the adjacent marshes and bayous. These mill-owners generally have lumber yards in Chicago, at the foot of Lake Michigan, and two of the defendants, who were mill-owners lived there; a third, Davis, conducted the business at Muskegon, and was also treasurer of the Association above named. In the winter of 1855 and 6, one A. B. Furman, cut and scaled 1444 thousand feet of logs in the woods, about 40 miles above the boom and these logs were driven down into the big boom.

The plaintiffs lived near Albany, N. Y., and in November, 1856, made a contract of sale of the aforesaid logs to the defendants. This contract is the foundation of the action, and is appended to the bill of exceptions: (*Record*, *p.* 20). It is as follows:

C. Davis & Co., of Muskegon, Mich., bought of Leonard and Ives, of Lansingburgh, per J. C. Shaw, agent, a quantity of pine saw-logs got out last winter by A. B. Furman, supposed to be about fourteen hundred and forty-four (1444 M. ft.) thousand feet in board measure, at the rate of four dollars and fifty cents per thousand feet for those afloat in the booms and bayous near the head of Muskegon Lake, and four dollars and twenty-five cents per M. feet for those on bank and in marsh

near said lake and booms; all to be counted, measured and scaled by the boom-master, or such other person as parties may agree on, as they are rafted up; said Davis & Co. are to raft up and secure all they can this fall, and all they can next spring, before the new drive comes down, and those not rafted up at that time are to be scaled as far as to be found on bank in booms and bayous as aforesaid.

Payments to be made as follows: All rafted up this fall to be paid for on the 15th December next; those rafted in spring to be paid for at the end of each month's rafting, and the balance to be settled for as soon as the scale of those not rafted shall be completed as aforesaid. And we said Davis & Co. agree to take all the merchantable logs at the rates and on the conditions herein named.

In consideration of the foregoing contract and sale, we acknowledge the receipt of one hundred dollars.

MUSKEGON, Mich., November 6, 1856.

(Signed) J. C. SHAW,
Agent for LEONARD & IVES.

(Signed) C. DAVIS & CO.

The suit was commenced by the filing of a declaration containing two counts, one upon the contract as executed, and the other upon it as executory, each alleging breaches of conditions on the part of the defendants. Notices accompany the plea alleging that only a part of the logs were merchantable, and that damages from the character of the logs should be recouped.

At the trial, the plaintiffs claimed to recover the contract price for about one-half the quantity sold, which had actually been rafted up by the defendants, scaled and sawed up into lumber, and also for the whole quantity sold, upon the ground that the defendants had appropriated a large portion without having the same scaled or measured at all, according to the contract.

I.

The first exception is to the exclusion of evidence offered by the plaintiffs. They offered a draft upon the plaintiffs, drawn

by Davis, the resident defendant, as treasurer of the Association, for the price of driving down into the big boom the 1444 thousand feet of logs. This draft had been accepted and paid.

It was offered to show the quantity of the logs, and also that the defendants, before making the purchase, knew the situation and quantity of the logs; and as tending therefore to prove that the sale was intended to be *in praesenti*, and not executory.

Persons are often held chargeable in one capacity with knowledge acquired in another capacity, even with a knowledge of facts known to their attorneys.

The objection therefore, that the draft was *res inter alios*, does not apply.

This piece of evidence also went to show that the defendant Davis, having dealt with the property previously as of a particular quantity, might well be presumed to have been satisfied on that point, and therefore strengthened the theory of the plaintiffs (hereafter fully adverted to) that the provision for scaling was no part of the contract of *sale*, but merely a mode of adjustment of the amount to be paid.

This testimony was improperly rejected. See

Cockrell v. Warner, 14 *Ark.* 325.

II.

The second exception is to the admission of evidence offered by the defendants, under objection, that some other person than *the boom-master* performed the duties of the office, and that he had deputies, (*Record, p.* 15). We may also consider here the actual charge of the court, that the boom-master was the agent of both parties, and that deputies could perform his duties.

I submit that upon the contract, which the court must construe, the plaintiffs, who lived at a great distance, clearly relied upon the individual and personal capacity and trustworthiness of "*the*" boom-master, as a man chosen by the Association for his fitness and integrity. His functions in his relations

to the parties to this suit were analogous to those of an arbitrator, who cannot delegate his authority.

So under Railway construction contracts, where the measurements are to be made by a specified engineer: *Redfield on Railways, p.* 209, *cas. cit.*

If the boom-master did not admeasure, "such other person as the parties might agree on," was to do it. *Hackley* had previously testified that he was the boom-master, and that *he* did not scale any logs. It is clear, that reference was not to any custom of the Association in regard to scaling by subordinates, or else there would have been no provision as to the selection of another scaler; and also, that it could not have been the intention that employes of the defendants should scale under a deputy boom-master, as was the fact: (*Record, p.* 15, *witnesses McHenry, O'Hara* and *Laing*).

See also *U. S. v. Robeson*, 9 *Peters*, 325. As to certificate of Arbuckle.

The admission was improper.

III.

The third exception was to the exclusion of evidence offered by the plaintiff, showing the quantity of the logs, by measurement at the place where they were cut in the woods, to be followed by evidence that the same quantity was driven down the river to the place where they were at the time of the sale: (*Record, p.* 16).

Assuming the sale to be executed, no objection could be made to this testimony except, perhaps, to the remoteness of the place of cutting; but this is obviated by the offer to show that *all* the logs came down, which indeed would have appeared from the admission of the draft heretofore referred to. This evidence also was the best the case admitted of, as the defendants had failed to procure about one-half the logs to be rafted and scaled themselves. And the stipulation in the contract as to scaling is a provision in favor of the defendants, the non-compliance with which (deposition of J. C. Shaw to Davis's admission "that he had neglected to scale the logs,"

Record, p. 14), makes them liable for the whole quantity, to be shown by the best procurable evidence. The endeavor of the defendants to show a proper scaling, indicates that they so understand it. And, if the sale was executed, as hereinafter urged, it is maintained that the above provision did not affect the quantity sold, but merely the times and amounts of payment. See also

Cushman v. Holyoke, 34 *Maine*, 289.

It would seem that the defendants themselves took this view of the case, for they introduced evidence to show that less than the alleged quantity came into the boom, (*Record, p.* 17) but the evidence was of the slightest character, being that *some* of the whole drive of forty millions of feet (which included the logs in question), were carried into the lake.

The evidence was improperly rejected.

IV.

The fourth exception is to the admission of evidence on the part of the defendants to show the unmerchantable character of the logs actually received and used by them, arising from latent defects.

The contract being written, it was, of course, the duty of the court to construe it, and all its parts were to be looked to. After a provision for making payment at the end of each month's rafting, comes the agreement by defendants to take all the merchantable logs. Taking these provisions together, the intention is clear that the defendants should determine *during the process of rafting* what logs they considered merchantable, for the conclusive reason that at the close of regular periods of that process they were to make payment for the logs rafted up to the given time, and it is impossible that any election was intended to be reserved after payments should be made, or the *right of action therefor had become fixed.* Again: to *take* the merchantable logs, is merely to *select*, and by taking any logs at all they made their selection.

Whether the contract was executed or executory, the sole

inquiry as to the admissibility of the class of testimony in question is, what is the time fixed by the intention of parties, as expressed in the writing for determining the character of logs?

The question is not what is the law on oral sales of personal property without inspection, but when, *by the writing*, was the inspection to be made?

The evidence was improperly admitted. (See also VI. 3 below).

V.

The fifth exception is to the admission of evidence on the part of the defendant of the general character of the pine in the region where the logs in question were cut: (*Record, p.* 16, *bottom*).

This evidence could not have the effect to prove that the logs in question were of bad quality, and, beyond controversy, was inadmissible. Its admission alone entitles the plaintiffs to a new trial.

VI.

As to the charges requested and denied.

They involve, substantially, three legal propositions.

1. That the sale under the contract was an executed sale.
2. That there was no warranty of quality of the logs.
3. That the defendants could only reject logs as unmerchantable at the time of rafting and scaling, and could not, after receipt, recoup for latent defects.

1. The rules for determining whether a contract of sale is executed or executory, are well settled and generally not difficult of application. When a lot of chattels, in existence and defined, is specifically sold at fixed prices, and they are to be measured merely to compute the sum to be paid, the title passes at once, and the sale is *in praesenti*.

Record, *p.* 14), makes them liable for the whole quantity, to be shown by the best procurable evidence. The endeavor of the defendants to show a proper scaling, indicates that they so understand it. And, if the sale was executed, as hereinafter urged, it is maintained that the above provision did not affect the quantity sold, but merely the times and amounts of payment. See also

Cushman v. Holyoke, 34 *Maine*, 289.

It would seem that the defendants themselves took this view of the case, for they introduced evidence to show that less than the alleged quantity came into the boom, (*Record*, *p.* 17) but the evidence was of the slightest character, being that *some* of the whole drive of forty millions of feet (which included the logs in question), were carried into the lake.

The evidence was improperly rejected.

IV.

The fourth exception is to the admission of evidence on the part of the defendants to show the unmerchantable character of the logs actually received and used by them, arising from latent defects.

The contract being written, it was, of course, the duty of the court to construe it, and all its parts were to be looked to. After a provision for making payment at the end of each month's rafting, comes the agreement by defendants to take all the merchantable logs. Taking these provisions together, the intention is clear that the defendants should determine *during the process of rafting* what logs they considered merchantable, for the conclusive reason that at the close of regular periods of that process they were to make payment for the logs rafted up to the given time, and it is impossible that any election was intended to be reserved after payments should be made, or the *right of action therefor had become fixed.* Again: to *take* the merchantable logs, is merely to *select*, and by taking any logs at all they made their selection.

Whether the contract was executed or executory, the sole

inquiry as to the admissibility of the class of testimony in question is, what is the time fixed by the intention of parties, as expressed in the writing for determining the character of logs?

The question is not what is the law on oral sales of personal property without inspection, but when, *by the writing*, was the inspection to be made?

The evidence was improperly admitted. (See also VI. 3 below).

V.

The fifth exception is to the admission of evidence on the part of the defendant of the general character of the pine in the region where the logs in question were cut: (*Record, p.* 16, *bottom*).

This evidence could not have the effect to prove that the logs in question were of bad quality, and, beyond controversy, was inadmissible. Its admission alone entitles the plaintiffs to a new trial.

VI.

As to the charges requested and denied.

They involve, substantially, three legal propositions.

1. That the sale under the contract was an executed sale.
2. That there was no warranty of quality of the logs.
3. That the defendants could only reject logs as unmerchantable at the time of rafting and scaling, and could not, after receipt, recoup for latent defects.

1. The rules for determining whether a contract of sale is executed or executory, are well settled and generally not difficult of application. When a lot of chattels, in existence and defined, is specifically sold at fixed prices, and they are to be measured merely to compute the sum to be paid, the title passes at once, and the sale is *in praesenti*.

Here the description of the property sold is "a quantity of pine saw-logs, got out by A. B. Furman, last winter, supposed to be 1444 thousand feet." The logs are completely identified. None other, although of the same kind, would satisfy the contract. It is not like a sale of logs yet to be cut, or a part, or a given number of feet out of a quantity.

The operative word is "*bought*"; the prices are fixed; no terms remain to be settled by the parties; nothing is to be done subsequently by the seller [except, contingently, to agree upon a measurer to reckon the entire amount to be paid]; and there is a delivery to, and taking possession by defendants upon the face of the contract.

The provisions as to rafting, counting and scaling, are no part of the contract of sale, but are merely provisions for computing the *amount* finally to be paid and the *times* of payment.

These provisions treat the property as delivered to the defendants and in their possession, as far as possible in the nature of things, and at their expense and risk. *They* are to raft up and secure, count, measure and scale. Plaintiffs lived 800 miles away, but, having an interest in the amount to be paid, which was to be fixed by the accuracy of the scaler, they might be called upon to select a new scaler.

Can it be doubted for a moment that defendants could have maintained replevin against creditors of plaintiffs who might attach the logs prior to the scaling?

I cite to the point of an executed sale,

2 *Kent Comm.* 492, 496, 500.
1 *Smith L. C.* 206, 2 *Ib.* 531, *Chit. Cont.* 375.
1 *Pars. Cont.* 440, 441.
Macomber vs. Parker, 13 *Pick.* 175.
Riddle vs. Varnum, 20 *Ib.* 280.
Damon vs. Osborn, 1 *Ib.* 476.
Scott vs. Wells, 6 *Watts. & Serg.* 368.
Dennis vs. Alexander, 3 *Barr* 50.
Davis vs. Moore, 1 *Shepley*, 427.
Boynton vs. Veazie, 11 *Shepley*, 286.
Frost vs. Godard, 12 *Shepley*, 411.
Cushman vs. Holyoke, 34 *Maine* 289.
Cunningham vs. Ashbrook, 20 *Missouri* 553.
Skindler v. Houston, 1 *Denio.* 48.
Brown v. Salesbury, 9 *Barb.* 511.
Tyler v. Strong, 21 *Id.* 198.

Crofoot v. Burnett, 2 *Comst.* 260.
Evarts v. Butler, Brayton, 216.
Cockrill v. Warner, 14 *Ark.* 325.
Hutchings v. Gilchrist, 23 *Vt.* 88.
Cole v. Transp. Co., 26 *Vt.* 87.
Birge v. Edgerton, 28 *Vt.* 294.
Whitehouse v. Trent, 12 *East*, 612.
Dixon v. Yates, 5 *B. & A.* 340.
Chaplin v. Rogers, 1 *East*, 192.

Many of these cases are sales of logs, and the *Maine*, *Vermont*, *Pennsylvania* and *Missouri* cases will be found especially pertinent and instructive, indeed, *conclusive*.

In *Macomber v. Parker*, (*ub. sup.*) the brick sold was to be merchantable. But this is not referred to as affecting the question of present sale.

But acceptance implies delivering, and even if it be admitted that there were conditions precedent, they were in favor of the purchaser, and if waived, they are liable for the whole quantity.

Jackson v. Anderson, 4 *Taunt.* 24.

So where defendants bought a quantity of wood of plaintiff, to be measured by an agreed surveyor, and defendants removed and used it without such measurement, it was held a waiver.

Cole v. Transp. Co., *ub. sup.*

2. The plaintiffs requested a charge that there was no express or implied warranty. The charge given was that the contract "imported a warranty" of quality: [*Record*, *p.* 19]. This language means, evidently, that the written contract of sale contains an express warranty.

An express warranty is an undertaking that the property shall equal the representation: [1 *Pars. Cont.* 463]. Hence, it is perfectly clear, that there was no express warranty in this case. The defendants agreed to take all the merchantable logs. Their right of rejection is not a warranty. There was no representation as to quality, or agreement to deliver a merchantable article, and, therefore, no undertaking that the logs should equal a representation. Such cases as

Randall v. Thornton, 43 *Maine*, 226,
Henshaw v. Robbins, 9 *Metc.* 83,

do not apply, as the logs are not described as merchantable.

Moreover, it is not natural to suppose that under the circumstances of this sale a vendor would give an express warranty.

There could be no implied warranty, for the question is merely the construction of a written contract of sale, not executory, and the logs do not therein appear to have been bought for a special purpose, and there was no fraud.

From the multiplicity of cases upon this point, I refer to the recent and full discussion in

Hargous v. Stone, 1 *Selden*, 81.

The actual charge then was wrong, and the charge requested, should have been given.

3. As to the charges that the defendants were bound to determine at the time of the rafting and scaling what they would take as merchantable, and that therefore they could not afterwards at the trial recoup damages from the alleged unmerchantable character of logs not only rafted and scaled, but also received, sawed up and disposed of by defendants, there can be but little doubt. I have already referred somewhat to this point in the preceding remarks [*IV. supra*]. The fifth charge requested [*Record, p.* 18] clearly expresses this position.

It is only necessary to refer to the terms of the contract to perceive that after the times of payment had passed, and the right of action had become fixed, no deduction could be made for latent defects unless there was fraud or warranty. The proposition is so clear, that argument can not further elucidate it. We have shown above that there was no warranty, and fraud is not pretended.

This case is far different from the class of cases referred to upon the other side, of executory agreements to deliver a thing described. There, undoubtedly, the vendee has a reasonable time to inspect, and may then return for latent defects, or give notice to the vendor to take back, and thereby rescind the contract.

Granting this case to be such, the defendants made no offer to return, and gave no notice to take back. They have not availed themselves of their privilege of rescission, and the contract is in full force. It will not do for the defendants to say that the property was valueless, and that therefore, the

plaintiffs shall have neither their property nor their money. Among other cases, see

Thornton v. Wynn, 12 *Wheat.* 183.

The most cursory view exhibits the inapplicability of the doctrine of the defendants to the present case, and it is quite clear that the contract itself in effect provides the time and manner of settling the merchantable character of the property.

The judgment should be reversed and the cause remanded for a new trial.

ALFRED RUSSELL,
Detroit.